1-30-1976

Vail M. Taylor v. Barbara N. Taylor and Barbara N. Taylor v. Vail M. Taylor

Appellant's Brief 1975-SC-1121

APPELLANT'S BRIEF

3671

SUPREME COURT OF KENTUCKY

No. 75-1121
No. 75-1130
(Consolidated Cases)

VAIL M. TAYLOR - - - - - Appellant

versus

BARBARA N. TAYLOR - - - - - Appellee

AND

BARBARA N. TAYLOR - - - Cross-Appellant

versus

VAIL M. TAYLOR - - - - Cross-Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, FIFTH DIVISION
HON. ALEXANDER BOOTH, JUDGE

BRIEF OF APPELLANT, CROSS-APPELLEE

ROBERT P. HASTINGS
HARDY, LOGAN & HASTINGS
430 South Fifth Street
Louisville, Kentucky 40202
Attorney for Appellant and Cross-Appellee

I certify that a copy of this pleading has been served upon Hon. Earl O'Bannon, Judge of Jefferson Circuit Court, Jefferson County Court House, Louisville, Kentucky; Mr. Russell Riggs and Mr. Jon Fleischaker, 28th Floor, Citizens Plaza, Louisville, Kentucky 40202, by mailing a copy thereof to them pursuant to RCA 1.250.

1/29/76

Attorney for Appellant and Cross-Appellant

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS AND AUTHORITIES

STATEMENT OF QUESTIONS PRESENTED

QUESTION I

Should the Determinative Date for Valuation of Marital Property Be the Date of Trial?

QUESTION II

Is the Maintenance and Child Support Award to Barbara Contrary to the Evidence Presented?

QUESTION III

Is an Award to the Wife, Which Exceeds 50% of the Value of Marital Property a Division of Marital Property in "Just Proportions" as Required by KRS 403.190?

SUPREME COURT OF KENTUCKY

No. 75-1121
No. 75-1130
(Consolidated Cases)

VAIL M. TAYLOR - - - - - - *Appellant*

v.

BARBARA N. TAYLOR - - - - - - *Appellee*

AND

BARBARA N. TAYLOR - - - *Cross-Appellant*

v.

VAIL M. TAYLOR - - - - *Cross-Appellee*

APPEAL FROM THE JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, FIFTH DIVISION
HON. ALEX G. BOOTH, JUDGE

BRIEF OF APPELLANT, CROSS-APPELLEE

May it please the Court:

INTRODUCTORY STATEMENT

Counsel for Appellant, Cross-Appellee, Vail M. Taylor, was employed to prosecute this appeal and did not represent Appellant, Cross-Appellee at any time prior to the entry of the Final Judgment herein.

For purposes of this Brief, and in view of this Court's Order consolidating the appeal and the cross-appeal for briefing purposes, Vail M. Taylor, Appellant, Cross-Appellee, shall be referred to as Vail, and Barbara N. Taylor, Appellee, Cross-Appellant, shall be referred to as Barbara.

STATEMENT OF THE CASE

A. Statement of Proceedings Below

On January 31, 1975, Barbara filed a Petition for Dissolution of Marriage against Vail in the Jefferson Circuit Court (TR-2-4). The case was assigned to the Chancery Branch, Fifth Division, Hon. Alexander Booth presiding. The Hon. Earl O'Bannon now presides in Chancery Branch, Fifth Division.

Vail filed a timely Response and Counter Petition, being represented by the Hon. G. Phillip Deeb, Sr., of the firm of Deeb and Segal (TR-5-7).

In accordance with Jefferson Circuit Court Rules, the case was assigned to April 16, 1975 for pre-trial conference (TR-8).

A Pre-trial Order was entered on April 16, 1975, setting the case for trial in chief on May 20, 1975, but for some reason not shown in the record, the case was not tried until June 2, 1975 (TR-69; see TE cover page).

On June 24, 1975, Judge Booth's Findings of Fact, Conclusions of Law; Judgment were entered (TR-102-106). Notice, pursuant to CR 77.04 was mailed on June 24, 1975 (TR-107). On June 27, 1975, Vail's

counsel filed a Motion to Modify the aforesaid Judgment and/or Grant a New Trial, said Motion supported by Affidavit of Vail (TR-108-116). On July 29, 1975, Judge Booth issued a Memorandum Opinion: Amended Judgment, and same was entered on that date (TR-136-138). Notice pursuant to CR 77.04 was mailed to counsel on July 29, 1975 (TR-139).

On August 22, 1975, Vail filed his Notice of Appeal from the Judgment entered June 24, 1975 and the Amended Judgment entered July 29, 1975, both of said Judgments having become final on July 29, 1975 (TR-140). Vail further filed his Designation of the entire Record on August 22, 1975 (TR-141).

Barbara filed her Notice of Cross-Appeal and her Designation of Record within ten days from date of Notice of Appeal and Designation filed by Vail (TR-142, 143).

On October 10, 1975, an Order was entered granting Vail and Barbara an additional 60 days from October 17, 1975 within which to file Transcript of Record with this Court (TR-143a, 143b).

This appeal was perfected by Vail on December 15, 1975, by his filing the Transcript of Record, Statement of Appeal, and paying the requisite tax and cost. This is shown by the Record in the office of the Clerk of the Supreme Court of Kentucky.

B. Statement of Facts

(1) MARITAL AND FAMILY FACTS

Barbara and Vail were married on August 1, 1953, in Cazenovia, New York. There were four children born of the marriage, to-wit: Clarke Taylor, born December 18, 1958; Carole Taylor, born November 5, 1963; Lisa Taylor, born November 6, 1965; and Emily Taylor, born June 14, 1973.

The Petition for Dissolution alleges that Barbara was 44 years of age at the time of filing and that Vail was 44 years of age.

All of the above is taken from the Petition for Dissolution of Marriage (TR-2-4).

The record further reflects that Barbara and Vail separated on January 11, 1975, and that the case was tried in chief on June 2, 1975 (TR-6; TE-cover page), a period of approximately six months.

(2) EDUCATIONAL AND WORK BACKGROUND

The evidence reflects that Barbara graduated from high school, attended two years of junior college, and then remained for a period of two years thereafter working in nursery school education (TE-8). Barbara did various volunteer work, was a camp counselor, did waitress work, took an additional course at Syracuse University, and after her termination at Cazenovia College in 1953, married Vail (TE-8-9).

After Barbara's marriage to Vail, and after his entry into the military, she worked as a receptionist in

Fort Worth, Texas (TE-9-10). Vail, who was a college graduate at the time of his separation from the military, entered graduate school at Cornell University in Ithaca, New York (TE-10; TR-29). During this period of time, Barbara was employed in several different capacities (TE-10-11) which ended when Vail went to work for the General Electric Company (TE-11).

From the time that Vail became employed by General Electric Company until the time of the dissolution of marriage or some few months thereafter, Barbara was not employed in any public employment.

There was filed as Petitioner's Exhibit 1, Barbara's resume which sets forth the type of volunteer work that she did during the marriage (TE-18: Petitioner's Exhibit 1).

Vail, in 1958, was employed by General Electric in its training program and remained until 1970 (TE-11).

Vail, since July, 1970, has been a Vice President of Celanese Coatings (TE-55).

(3) INCOME OF THE PARTIES

In 1974, and to his termination, Vail had a gross base salary, per annum, of $37,750 from Celanese (Deposition, Vail M. Taylor, page 24). In addition thereto, he received a bonus, which in the year, 1975, amounted to a gross figure of $9,000 (TE-90) which netted to $6,131.00 after deductions (TR-99).

The joint Federal Income Tax Return of Vail and Barbara was introduced into evidence as Petitioner's Exhibit 4 (TE-93). This Return showed a gross income of $50,622. As shown by the testimony of Vail, there must be deducted from that figure, the sum of $2,037, which represents a deferred tax dividend from the General Electric Savings and Security Plan which did not represent actual cash received by Vail during the year 1974 (TE-93). General Electric was Vail's employer prior to Celanese.

It must be remembered that Vail received his income in two bites. In his deposition that was taken by Barbara's counsel on March 25, 1975, it was aptly stated (page 14):

> "Q. 54. Okay. I believe your compensation from Celanese is paid to you in two different ways; first a monthly salary and secondly an annual lump sum which is characterized as a bonus, is that correct?
>
> A. Assuming a bonus is paid, that is correct."

As earlier stated, Vail received a 1974 bonus paid in the year 1975 in the gross sum of $9,000 (Deposition, Vail M. Taylor, p. 22).

Barbara's counsel, on cross-examination, attempted to have Vail deduct his income taxes from his 1974 gross income and arrive at an average net income of approximately $3,000 per month (TE-94-95). Obviously, that figure was not and is not correct when the evidence is read, to-wit (TE-95):

"Q. 472. And that is approximately $3,000 net income per month, is it not?

A. It would be approximately. Let me explain more. That includes bonus.

Q. 473. The average net income would be $3,000 per month, is that not correct?

A. That is not what I stated before.

Judge: I think I understood the answer, go ahead."

Vail's actual net monthly check amounted to $1,935.69 (TE-64; TR-47).

Barbara was not employed at the time of the divorce or for several years prior thereto.

(4) EXPENSES OF THE PARTIES

Barbara filed a budget for herself and four infant children which totaled the sum of $1,752 per month (TE-20: Petitioner's Exhibit 2).

Vail filed as Respondent's Exhibit 2, a statement of actual expenses for Barbara and the three infant children showing a need on her part in the sum of $847.59 (TE-77: Respondent's Exhibit 2). Attached to this Brief as Appendix 1 is Respondent's Exhibit 2. As stated in Vail's testimony, Respondent's Exhibit 2 was based on actual expenses for the year 1974 as taken from receipts maintained by him (TE-77).

Vail also filed as Respondent's Exhibit 3 a statement of his expenses and need in the sum of $1,216 (TE-81: Respondent's Exhibit 3). This statement does not include any expenses for his son, Clarke, whose custody was awarded to him in the Final Decree.

(5) MARITAL PROPERTY

It was stipulated at the trial that the equity in the parties' residence (4300 Talahai Way, Louisville, Kentucky) was $32,500 (TE-3). It was further stipulated that the marital furniture, fixtures and/or appliances in the possession of Barbara on the date of trial had a value of $7,313 (TE-3). The value of marital furniture, fixtures and/or appliances in the possession of Vail was $1,691 (TE-3). The above mentioned represent the only stipulated values of properties owned by Barbara and Vail.

It was also shown that a 1974 Mercury in the possession of Barbara had a value of $3,700 and a 1974 Pinto in the possession of Vail had a value of $2,650. Both automobiles are free of any encumbrance.

After valuing the above mentioned property, things become much more difficult. The difficulty arises from the fact that presumably, three (3) different valuation dates were used, to-wit:

(1) Date of Separation, January 11, 1975
(2) Date of Receipt of Bonus, February, 1975
(3) An attempt to use valuations as of Date of Trial, June 2, 1975.

Both Vail and Barbara submitted to Judge Booth "Proposed Divisions of Marital Property." Barbara's proposed division of marital property is printed as Appendix 2 of this Brief (TR-84-86).

Vail's proposed division of marital property is printed as Appendix 3 to this Brief (TR-98-100).

From comparing the two Appendices, it can quickly be seen that present counsel for Vail is at a loss to state to this Court who got what percent of what. One conclusion, though, is obvious: Vail got "what Paddy shot at and missed."

The Findings of Fact, Conclusions of Law; Judgment is printed as Appendix 4 (TR-102-106).

The Memorandum Opinion; Amended Judgment is printed as Appendix 5 (TR-136-138).

Basically, the Judgments award the following property to Barbara:

Residence (she assumes mortgage) . . .	$32,500.00
1974 Mercury.	3,750.00
Furniture, Fixtures, etc.	7,313.00

Barbara was also awarded maintenance in the sum of $500 per month for two years, and $250 per month for an additional two years.

Child support was fixed in the sum of $250 per month per child (three children) or a total of $750 per month.

Vail was awarded:

Furniture in his possession.	$1,691.00
1974 Pinto.	2,650.00
Cash surrender value of life insurance.	1,879.00

The Court then went on to say (TR-104, appendix 4, p. 35):

> "He should have the 1974 Pinto automobile, the cash value of life insurance, the remaining securities and savings bonds which are in his name, and the remaining amounts in the checking and

> savings accounts which on January 11, 1975, the date of the separation of the parties, amounted to $5,747.62, and $4,616.36. He should have the pension funds at General Electric and Celanese Corporation and any amount remaining from the bonus which he received in February 1975. Any remaining marital debts should be paid by Vail other than the mortgage on the real estate."

In addition, Vail was ordered to pay Barbara's counsel a fee of $4,000, plus all costs of the action. Needless to say, Vail was obligated to pay his counsel, which he did, in the sum of $3,000.

QUESTION I

Should the Determinative Date for Valuation of Marital Property Be the Date of Trial?

The case at Bar raises a most perplexing issue with regard to the determinative date for the valuation of "marital property." What has obviously caused the confusion in this case has and is causing confusion in other cases.

KRS 403.190(2)(c) excludes from the definition of "marital property" "property acquired by a spouse after a decree of legal separation." The matter is further compounded when one reads *KRS 403.190(3).* This section states:

> "(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by

> the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section."

An interpretation of the above Statutes obviously led Vail's trial counsel to the conclusion that any property acquired after the date of separation fell in the category of non-marital property. This is very clearly shown in the deposition of Vail, which was taken on March 25, 1975, by Barbara's counsel. Barbara's counsel was inquiring at the deposition into securities which Vail may have owned (Deposition, Vail M. Taylor, p. 46). The following is a dialogue between counsel (Vail M. Taylor, Deposition, pages 46, 47).

> "Q. 179. Will you check your safety deposit box and if you do—
>
> A. (Interrupting) I shall.
>
> Mr. Deeb: Let me note an objection as to what date.
>
> Mr. Riggs: As of today, and/or as of December 31, 1974.
>
> Mr. Deeb: Let me show an objection to any information which would show an accumulation after the separation which again would be non-marital property."

Similar objection is made by Mr. Deeb on pages 49, 50, 51, 52, and specifically on page 74 of the Deposition where it is stated:

> "Mr. Deeb: (Interrupting) Beyond the date. Not more than what you are entitled to. But we are saying that we don't feel you would be entitled to anything after the 11th.

> Mr. Riggs: I am making a formal request and you are denying that request?
>
> Mr. Deeb: (Nodding head in the affirmative—) This is due to my interpretation of 403 that describes the subsection of the discrepancy of marital property, it includes property accumulated after separation."

The full effect of Mr. Deeb's objections comes to the fore on June 2, the date of trial. Commencing on page 81 of the Transcript of Evidence, the following occurred during the direct examination of Vail by his counsel, Mr. Deeb:

> "Q. 398. Now, have you depleted any of your savings accounts or checking accounts you had at the time of separation during the period of time you were separated from Mrs. Taylor.
>
> A. Yes.
>
> (At this time there was an objection to the question, with Judge sustaining, and then an off the record discussion ensued, and Mr. Deeb withdrew Question 398.)"

The record is silent as to the basis for the Judge's sustaining the Petitioner's objection to the question. Barbara's counsel assert in their "Response to Respondent's Motion for a New Trial or Modification of Judgment" that the objection was sustained because Vail's counsel had refused to allow discovery of assets or value of assets after January 11 (TR-126).

The net effect of sustaining this objection by Judge Booth is best shown in "Respondent's proposed division of Property" (TR-98-100, Appendix 3). Therein it is shown that on the date of trial, savings bonds in

the sum of $975 were depleted. Savings accounts as of 1-11-75, which amounted to $5,747.62 had a present balance of $980. Securities as of 1-11-75 with a value of $10,598 on that date, may have increased or decreased in value, but $1,395 worth of securities were sold.

The bonus which was received on February 17, 1975 in the net sum of $6,131.22 did not on June 2, 1975 represent an asset or cash in the bank in the sum of $6,131.22 as substantial amounts were paid for various debts (see TR-68).

The only items of property that were not subject to substantial fluctuation of values were those properties awarded to Barbara.

It is submitted to the Court that Judge Booth committed reversible error when he refused to allow Vail's counsel to present evidence as to the balances in his checking and savings accounts on the date of trial and on this ground alone, the case should be remanded to the Circuit Court for a true determination of the value of the marital property.

QUESTION II

Is the Maintenance and Child Support Award to Barbara Contrary to the Evidence Presented?

The trial court awarded Barbara $500 per month maintenance for two years and $250 per month for two years thereafter. In addition, it awarded child support in the sum of $250 per child per month for the three children or a total of $750 per month. A grand

total of $1250 per month for two years, $1,000 per month for two years thereafter. For purposes of this argument, the amounts need not be extended further.

It is submitted to this Court that in several respects, the judgment of the trial court is clearly erroneous.

With regard to the maintenance and support question, the court must look to the "spendable dollars" available to Vail. *KRS 403.200(2)(a) and (f):*

> "(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> "(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> "(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance."

KRS 403.210(5) states:

> "Child support.—In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:
>
> "(5) The financial resources and needs of the noncustodial parent."

It is uncontradicted in this record that, on a monthly basis, Vail's net take home pay was $1,935. As Vail testified (TE-64):

> "Q. 306 Mr. Taylor, you earn a wage, and you are paid monthly, is that correct.
>
> A. Paid twice per month.
>
> Q. 307. What is your net take home pay per month in your present corporation?
>
> A. My average for 1974 is $1,935 per month take home pay.
>
> Q. 308. That is after all deductions, is that correct?
>
> A. That is correct."

It is further uncontradicted in the evidence that on February 17, 1975, Vail received a bonus in the "net" sum of $6,131. Simple mathematics shows that *if* this amount were paid on a monthly basis it would average about $500, but such is not the case. The Court knew on June 24, 1975 when the Judgment was entered that the $6,161 was not intact for he stated in his opinion:

> "* * * He should have the pension funds at General Electric and Celanese Corporation *and any amount remaining from the bonus which he received in February, 1975.* * * *" (TR-104, Appendix 4, p. 35). (Emphasis supplied.)

The Court went further and said that Vail was responsible for "any remaining marital debts" save the mortgage. Assuming that there was anything left of the bonus, the Court required payment of $4,000 in Barbara's legal fees plus the costs not even thinking of Vail's legal fees.

A most interesting facet regarding this "bonus" is that Barbara in her "proposed division of marital property" listed the $9,000 bonus" as marital property" (TR-85, Appendix, 2, page 27). She was not even kind enough to deduct the taxes withheld on the bonus, before listing it as marital property.

Assuming arguendo, it would seem that if the "bonus" is "marital property" then only the income derived from investing it could be included in income for purposes of paying maintenance and child support!! (Emphasis supplied.)

If this is not true, then Barbara, as a result of the judgment, would have income amounting to $43,513, the value of the property awarded to her. How illogical!!

In the final analysis, the conclusion cannot be escaped that the trial court awarded Barbara in maintenance and child support 64% ($1,250 ÷ $1,935). of Vail's actual net monthly pay. This has left Vail with $685 per month to support himself and Clarke, his 17 year old son. A clearly unjust determination.

Even assuming that the bonus could be spread over the 12 months, this only adds $500 per month. This still gives Barbara 51% of Vail's "average" monthly income, computed on a year's basis.

It is submitted that the trial court essentially looked at the $50,000 per year before taxes that he said Vail earned, and started awarding money (TR-102, Appendix 4, p. 33).

In addition to all of the above, the Court gave Vail no credit whatsoever for any income that could be

derived from the property valued at $43,500, which she was awarded. That amount of money invested at 6% could earn $2,610 or $217.50 per month.

Barbara can work if she wants to.

Seemingly, as of June 2, 1975, she did not want to for she testified that she would not put in a full day anywhere except to care for the children (TE-39). She is away from the children two to three days a week, though, for which she expends $43 per month for a babysitter and $69 per month for housecleaning (Petitioner's Exhibit 2).

This brief could be unduly extended by going into great detail about Barbara's expenses and Vail's expenses, and the children's expenses and everybody's wants, but it should be clear to the Court at this point, that the award that has been made is clearly erroneous considering only Vail's "spendable dollars." All parties are entitled to live after a divorce, but in this case, Vail and Clarke cannot even exist, let alone live.

QUESTION III

Is an Award to the Wife, Which Exceeds 50% of the Value of Marital Property a Division of Marital Property in "Just Proportions" as Required by KRS 403.190?

As was stated in argument of the First Question Presented, there is not now nor can there be an accurate balance sheet of values of "marital property" as of the date of trial, because the figures were not presented. This, in and of itself, requires that the property matters be retried by the Circuit Court.

Notwithstanding, that argument, it is clear that the judgment does not make a division of "marital property" in "just proportions" as required by KRS 403.190. Vail, of course, is begging the question to a certain extent, because what is the division in just proportions"? The Statute sets out various factors, but precedes these by stating that "all relevant factors" shall be considered.

Barbara cannot contest the fact that her monetary "contribution" was small and Vail's was large. Contrawise, Vail cannot contest the fact that Barbara made a "contribution" as a homemaker and the mother of four children. Neither can contest the fact that the marriage was of substantial duration.

An attempt shall be made to provide this Court with a listing of "marital property" with valuations.

Property	Value 1/11/75	Value 6/2/75	Value 3/26/75
Residence		$32,500.00	
Furniture in Barbara's possession		7,313.00	
Furniture in Vail's possession		1,691.00	
1974 Mercury		3,700.00	
1974 Pinto		2,650.00	
131 shares of G. E. common		4,585.00	$5,961.00
90 shares Celanese common			2,621.00
46 shares Peabody-Galion common			782.00

Property	Value 1/11/75	Value 6/2/75	Value 3/26/75
37 shares G.E. Savings and Security.....			897.00
(1) Union Oil Co. Bond ($2,000 face).....			2,000.00
C.S.V.-Life Insurance...		1,879.00	
Savings Accounts:			
First National Bank..	$2,883.99		
Yonkers Savings Bank.....	2,863.63	980.00	
Savings Bonds.....	975.00	0	
Celanese Stock Bonus and investment plan (S.B.I.P.).....	4,164.36	3,100.00(?)	
G. E. Pension Fund....	4,616.00		
Checking Accounts....		508.00	2,040.36

The confusion as represented by the above listing is further compounded when this Court looks at what Barbara considered to be the value of marital property (TR-84-85, Appendix 2). She contended not only in her "proposed division of marital property" (TR-84-86, Appendix 2), but also in her "Response to Respondent's Motion for a New Trial or Modification of Judgment" (TR 125-128) that the marital estate amounted to $94,878.52, less $4,719.00 for debts or a total of $90,159.52.

It is submitted to the Court that Barbara has added in this total, figures that cannot under any circumstances be considered marital property.

The first item is the bonus received 2/27/75. She consistently presented to the trial court, as "marital property," "1974 bonus" (received February, 1975 $9,000.00 (TR-85, 128).

In the first place, even if the bonus could be considered marital property, which it cannot, the actual amount received was $6,131.00.

At no time has Barbara contested this figure as being the actual amount received, except in her documents filed with the Judge. The Court made its *findings without benefit of the transcript of evidence.*

> "* * * Judge: Now, you want me to decide this case without having the case written up, so let's please let me make notes. * * *" (TE-3).

The next item is the valuation of Vail's interest in the Celanese Corporation Stock Bonus Plan (S.B.I.P.). The evidence clearly reflected that the value of Vail's contribution, which was available to him if he *voluntarily* terminated with Celanese was $3,100 (TE-88, 89). Barbara presented to the Court the figure of $10,427.00 as being Vail's "present interest" (TR-85), knowing full well that this amount would only be available to Vail if he was "involuntarily terminated" (TE-88, 89). If property is not available, how can it be considered "marital property" subject to division in "just proportions"? The answer is obvious; it cannot!!

To now make the first recapitulation:

Barbara's statement of Marital property.		$90,159.00
Less: those items which are not marital property:		
Bonus.	$9,000.00	
Stock plan.	7,327.00	
		16,327.00
		$73,832.00

Barbara was awarded $43,500 in property making her percentage of "marital property" ($43,500 ÷ $73,832) 59%.

The clear error in the Judgments does not stop here.

The trial court ordered Vail to pay Barbara's attorneys a fee of $4,000, plus all the costs of the action, plus, of course, Vail was required to pay his own attorney. These items must be considered as debts of the "marital estate."

The next recapitulation shows:

Marital estate after first recapitulation		$73,832.00
Less: attorneys fees and cost		
Barbara's counsel	$4,000.00	
Vail's counsel	3,000.00	
Costs and depositions	539.00	7,539.00
MARITAL ESTATE		$66,293.00

Barbara's percentage of marital property is now ($43,500 ÷ $66,293) 66%.

The next items that must be looked at are the balances in checking and savings accounts on June 2, 1975, the date of trial. Barbara contended that on January 11, 1975, the savings account balances were $5,747.62. Vail contends that the balances were $980, a difference of $4,767.62. The savings bond balance Barbara contended was $975.00, when it was clearly shown, as of April 16, 1975, the date of pre-trial, that the bonds had been sold and the proceeds used for family expenses. Barbara further contends that Vail's checking account was $2,040.36, while Vail contends it was $508, a difference of $1,532.36.

The icing on the cake is the contention of Barbara that the 131 shares of General Electric stock had a value of $5,960.50, or $45.50 per share, though Barbara will vociferously contend that all property must be valued at date of separation (1/11/75). The $45.50 value on the G.E. stock is as of 3/26/75 (TR-27). The actual value, per share, of the stock on 12/31/74 was $35 per share (see Exhibit 2 to Deposition of Vail M. Taylor). Thus, there is a difference in value of $1,375.50.

The third recapitulation of marital estate is:

Marital estate (second recapitulation)		$66,293.00
Less:		
Difference in savings accounts	$4,767.62	
Difference in checking accounts	1,532.26	
Difference in value of G.E. stock	1,375.50	7,675.72
		$58,617.28

Barbara's percentage of the marital estate is now ($43,500 ÷ $58,617.28) 74%.

It is submitted to the Court that the figures can be juggled in any fashion, but the conclusion is inescapable: Barbara was awarded at least 59% of the marital estate.

CONCLUSION

This case must be reversed and a new hearing held. What other conclusion can be reached?

Respectfully submitted,

ROBERT P. HASTINGS
HARDY, LOGAN & HASTINGS
430 South Fifth Street
Louisville, Kentucky 40202

Attorney for Appellant, Cross-Appellee

APPENDIX

APPENDIX 1

RESPONDENT'S EXHIBIT No. 2

EXPENSES*—1 ADULT, 3 CHILDREN

Mortgage (1975)	344.00	
Food—3 Children—1 Adult	200.00	
Milk—Ewings—499.88 X 66% = 329.92 ÷ 12	27.49	
Telephone—250.13 ÷ 12 = 20.84 X 55%	11.46	
Utilities & Water—901.27 ÷ 12 = 76.00 658.65 LG&E; 242.64 LWC = 901.27	75.10	
Gasoline—774*-100—Vacation = 674 X 40% BNT—60% UMT = 270 ÷ 12	22.47	
Auto Maintenance—New Auto—NIL in 1974—$100 Allow.	8.33	
Home Repair—McLeers 97.17—Furnace 25.25—Other 25.50 = 147.92 ÷ 12	12.32	
Dental—BNT and Children—188.00 ÷ 12 = 15.67	15.67	
Medical—Wolf 125—Jenkins 12—Gillim 12—Hoffman 12—Yose 19 = 180	15.00	
Medical Insur.—BNT (Only) 62.50/Quarter =	20.83	
Drugs & Sundries—Taylor Drugs—170.86* X 66% = 112.77 ÷ 12 =	9.40	
Homeowner's Policy—USAA—163 ÷ 12	13.58	
Auto Insurance—230 (Montego) ÷ 12 = 19 (Prepaid for 1975)	19.00	(19.00)
Drycleaning	7.00	
Pers. Property—107.91 X 66% = 71.22	5.94	
Clothing—3 Children	40.00	
Total	847.59	828.59

*Actual expenses for 1974 from receipts maintained.

APPENDIX 2

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIFTH DIVISION

No. 196459

BARBARA N. TAYLOR - - - - - - *Petitioner*

v.

VAIL M. TAYLOR - - - - - - - *Respondent*

PETITIONER'S PROPOSED DIVISION OF MARITAL PROPERTY

MARITAL PROPERTY

Real Estate: Appraised Value	$66,000.00	
Debt Remaining	33,500.00	$33,500.00
Personal Property:		
Savings Accounts:		
First National Bank	$ 2,883.99	
Yonkers Savings Bank	2,863.63	
(Both as of January 11, 1975) ...	$ 5,747.62	5,747.62
Checking Account (See Respondent's Pre-Trial Compliance Report)		2,040.36
Savings Bonds		975.00
Securities (See both Petitioner's and Respondent's Pre-Trial Compliance Reports) 131 GE Common		5,960.50

90 Celanese		2,700.00
46 Peabody		782.00
37 GE S&S		897.00
Union Oil Bond		2,000.00
Cash Value—Life Insurance		1,878.68
Pension & Stock Rights		
GE—Present vested interest		4,616.36
Celanese—Present interest		10,427.00
Household furnishings—		
Presently in possession of Petitioner		7,313.00
Presently in possession of Respondent		1,691.00
Automobiles:		
1974 Mercury	$ 3,700.00	
1974 Pinto	2,650.00	
	$ 6,350.00	6,350.00
1974 Bonus (Received Febrruary, 1975)		9,000.00
Sub Total		$94,878.52
Debts		—4,719.00
Total		$90,159.52

PROPOSED DIVISION OF MARITAL PROPERTY

1. Real estate to be transferred, subject to mortgage, to wife.

2. Wife to have title to 1974 Mercury.

3. Each party to retain household furnishings presently in their possession.

4. Petitioner to be granted $5,000.00 in securities.

5. Husband to have title to 1974 Ford Pinto Station wagon.

6. Husband to retain household furnishings in his possession.

7. Husband to retain bonus.

8. Husband to retain savings bonds.

9. Husband to retain cash value of life insurance.

10. Husband to retain interest in GE pension fund.

12. Husband to retain interest in Celanese pension and profit sharing fund.

13. Husband to retain savings accounts.

14. Husband to retain securities (minus those transferred to Petitioner).

Respectfully submitted,

Wyatt, Grafton & Sloss
2800 Citizens Plaza
Louisville, Kentucky 40202
(s) Russell H. Riggs
Counsel for Petitioner

APPENDIX 3

RESPONDENT'S PROPOSED DIVISION OF PROPERTY

Real Estate—to husband with lien to wife of ½ equity of $28,487.50 or $14,243.75

Value	$66,000.00	
Less mtge	33,653.00	1/11/75
Net equity	$32,347.00	
Less ½ debts..	3,859.50	(debts, attorneys' fees and costs of $7,719.00)
Net equity	$28,487.50	

The above lien would be paid when sold, no interest. Wife and children to occupy same until wife remarries, dies or she decides to sell; or when youngest child no longer lives there, is emancipated, marries or dies, not to exceed 18th birthday of the youngest child living in said home. Out of support payments, husband to pay house payment of $344 monthly.

Personal Property—

To Wife:

Marital furniture in possession ...	$ 7,313.00	
1974 Mercury	3,700.00	
$100 maintenance x 24 months ...	2,400.00	
Occupancy of home $344 x 12 months x 16 years (possibility of 16 years)	66,048.00	projected
Personal property—	$779,461.00	
Real property—	14,243.75	
	$ 93,804.75	

To Husband:		
Marital furniture in possession ...	$ 1,691.00	
1974 Pinto	2,650.00	
Cash value of life insurance 1/11/75	1,879.00	
Securities 1/11/75 ..... (sold $1,395 to maintain parties)	10,598.00	
Savings bonds 1/11/75 ..... (depleted)	975.00	
Checking account 1/11/75 ..... (original amount depleted)	508.00	
Savings Account 1/11/75 ..... (present balance, $980.00)	5,747.62	
Pension rights: G.E. 1/11/75	4,616.36	
Celanese 1/11/75 .	3,100.00	
Bonus—net (received 2/75)	6,131.00	
Personal property	37,895.98	
Real property	$ 14,243.75	
	52,139.73	
Debts to be paid from estate:		
Marital debts	$ 4,719.00	
Costs, approximately	500.00	
Wyatt, Grafton & Sloss, Attorneys	1,250.00	
Deeb & Segal, Attorneys	1,250.00	
	$ 7,719.00	estimated

RESPONDENT'S PROPOSED CHILD SUPPORT

1. Respondent takes home monthly a net sum of $1,935.00
2. Respondent will place $2,400.00 in account for wife to withdraw $100 monthly as maintenance for two year period only.
3. Respondent will pay $175.00 per month, per each child, 3 x 175.00 ..... $ 525.00

Out of $525 he will make house payment of $344 and send the Petitioner $181.00 monthly. Respondent to provide home for 16 yr. old son.

4. Wife can earn minimum wage of $2.10 hourly, a net of $290.00 monthly.

5. Should wife sell the house, invest her $14,243.75 in Certificates of Deposit at 7½% annual interest, she would receive $1,068.28 additional income annually or a monthly sum of 89.02

6. By selling her equity, petitioner's income and support would be as follows:

Salary	$ 290.00
Maintenance for 2 years ...	100.00
Child support/3 children ..	525.00
Interest income	89.02
	$1,004.02 monthly

7. Without selling her equity, petitioner would have $1,004.02 less interest, monthly, or a minus of $89.02, for a net of $915.00 monthly.

8. The respondent's present hospitalization is extensive in the coverage it affords. He will be responsible only to the extent of such major coverage as this group policy affords or any subsequent employer may provide.

RESTORATION

Pre-marital property and inheritance is restorable to its rightful owner or claimant.

ESTATE OF RESPONDENT'S FATHER & MOTHER

The eventual receipt of inheritance from the estate of respondent's parents is at least six months away.

It consist of:

	Respondent's interest
Real estate 0½% of $60,000 is	$30,000.00
Securities and other assets	14,329.80

The Respondent cannot receive income from the residence as his niece, as per request of his deceased mother, will occupy the house for at least four to five years, rent free. Both heirs intend to respect the direction of their deceased parents.

SUMMARY

To Wife	To Husband
$93,704.75	$52,139.73

Respectfully submitted,

Deeb & Segal, Attorneys
(s) G. Phillip Deeb, Sr.
730 West Market Street
Louisville, Kentucky 40202
Counsel for Respondent

It is hereby certified a copy hereof was delivered this 9th day of June, 1975, to:

Russell Riggs, Attorney
Jon L. Fleischaker, Attorney
Wyatt, Grafton & Sloss
Counsel for Petitioner
Citizens Plaza Building
Louisville, Kentucky 40202

(s) G. Phillip Deeb, Sr.
Counsel for Respondent

APPENDIX 4

FINDINGS OF FACT, CONCLUSIONS OF LAW; JUDGMENT—Filed June 24, 1975

This action was filed on January 31 1975 by Barbara N. Taylor, age 44, hereinafter called "Barbara," against Vail M. Taylor, age 44, hereinafter called "Vail." Barbara has not worked for pay since 1957, having acted primarily as a homemaker and superintending the activitise of the children of the parties; however she has had numerous civic and charitable jobs. Vail is a Vice President of Celanese Coatings Company and has an income before taxes of approximately $50,000 per year. The children of the parties are as follows:

Clarke Taylor, born December 18, 1958
Carole Taylor, born November 4, 1963
Lisa Taylor, born November 5, 1965
Emily Taylor, born June 14, 1973

Clarke has expressed a desire to reside primarily with his father, and is old enough to know his own mind. The three girls are living with their mother. There is no controversy as to custody and there has apparently been no conflict as to visitation rights.

Barbara lives in the family home at 4300 Talahi Way, Louisville 40207; Vail lives in an apartment at 608 Royer Court, Louisville.

Barbara and Vail were married on August 1, 1953 when each was twenty-two years old. Both are highly intelligent, attractive, able persons. Vail has been highly successful in business, first with General Electric Company and since July 1970 with Celanese Corporation. Barbara has undoubtedly been a very considerable help to him in attaining his success.

After they were married, Barbara worked while Vail was in the armed services for about two years, and also

during the next several years when Vail was attending Cornell University Business School, from which he graduated. Barbara worked for some time thereafter, until about 1957, while Vail was getting started in his business career. Since 1957, Barbara has devoted her efforts and abilities primarily to being a homemaker (KRS 403.190). Undoubtedly, if Barbara had pursued a career of her own she would have acquired job skills and abilities which would have put her in a reasonably high income bracket by now. She has had a good many civic and charitable jobs, which have not only put her in touch with many people but kept her hand in as far as learning skills which would help her in a business way. These include positions in various Junior League activities, theatrical groups, and have related to fund raising which would be helpful in learning to obtain good jobs for pay. At age 44, in the opinion of the Court, she still can acquire considerable job skills so as to become financially self-supporting despite having the primary responsibility for raising three children. This process will take some time however. In addition to a fair division of the marital property, Barbara should receive maintenance for a reasonable period of time during which she can increase her ability to obtain and hold employment with a good income.

On this subject of maintenance over a limited period of years, this action has certain similarity with *Casper* v. *Casper,* Ky., 510 S. W. 2d 253 (March 1, 1974, as modified on denial of rehearing May 10, 1974).

As the three younger children are by agreement of the parties to be in the primary custody of Barbara, it would seem that to give them a feeling of family security and solidarity, the home property of the parties, being real estate located at 4300 Talahi Way, Louisville, should be awarded to Barbara, subject to the mortgage thereon. The equity in the real estate is approximately $32,500, and in view of the award of intangible property to Vail, as set out below, it does not seem unreasonable that she have the outright ownership of this property, to retain or to sell as

appears in the best interest of herself and the children. Barbara should also have the marital furniture now located in the said home and being now in her possession. She should also have the 1974 Mercury.

Vail should have the marital furniture now in his possession, and such furniture as is appropriate for the use of Clarke Taylor, who will be living with him. He should have the 1974 Pinto automobile, the cash value of life insurance, the remaining securities and savings bonds which are in his name, and the remaining amounts in the checking and savings accounts which on January 11, 1975, the date of the separation of the parties, amounted to $5,747.62, and $4,616.36. He should have the pension funds at General Electric and Celanese Corporation and any amount remaining from the bonus which he received in February 1975. Any remaining marital debts should be paid by Vail other than the mortgage on the real estate. In regard to a fair amount for child support, the parties are at very distant poles in their claims as to what is a reasonable amount. The Court is of the opinion that a fair amount for Vail to pay to Barbara for the support of each of the three children who will be in her custody, in view of the fact that she will have the burden of upkeep and maintenance of the real estate and making the mortgage payments, will be $250.00 per child per month, or a total of $750.00 each month.

In view of the above findings as to the earning abilities of the parties and prospects for the future, it would seem fair to award to Barbara as periodic maintenance the sum of $500.00 per month for two years and $250.00 per month for an additional two years, and that this period of time should enable her to acquire job skills sufficient to adequately maintain herself in a style similar to that which she has been accustomed to during the marriage.

JUDGMENT

1. The Findings of Fact and Conclusions of Law set out above are incorporated herein and made a part of this Judgment by reference.

2. The marriage between the Petitioner, Barbara N. Taylor, and the Respondent, Vail M. Taylor, of August 1, 1953, may be and it is hereby dissolved.

3. The care, custody and control of Carole, Lisa and Emily Taylor are hereby awarded to the Petitioner, Barbara N. Taylor, subject to reasonable visitation rights by Respondent. The care, custody and control of Clarke Taylor is hereby awarded to the Respondent, Vail M. Taylor, subject to reasonable visitation rights by Petitioner.

4. Respondent, Vail M. Taylor, shall pay to Petitioner, Barbara N. Taylor, the sum of $250.00 each per month for the support of Carole, Lisa and Emily Taylor, or a total of $750.00 per month.

5. The residence of the parties located at 4300 Talahi Way, Louisville, is awarded to Petitioner, subject to the payment by her of the mortgage thereon.

6. The personal property of the parties is to be divided in accordance with the above findings of fact and conclusions of law.

7. Respondent shall pay to Petitioner the sum of $500.00 per month for a period of two years and $250.00 per month for an additional two years as periodic maintenance, being a total of $18,000.00.

8. The costs of this action shall be paid by Respondent and he shall also pay to the attorneys for Petitioner, being the firm of Wyatt, Grafton & Sloss, the sum of $4,000.00 on account of their services as attorneys herein.

9. This is a final appealable Judgment and there is no just cause for delay; the amount in controversy herein exceeds the sum of $2500.00, exclusive of interest and costs.

(s) Alexander G. Booth
Judge
June 24, 1975

cc: Mr. Russell H. Riggs and
Mr. Jon L. Fleischaker
G. Phillip Deeb, Sr.

APPENDIX 5

MEMORANDUM OPINION; AMENDED JUDGMENT—
Filed July 29, 1975

This Opinion is written in regard to the Respondent's Motion for a New Trial or for a Modification of the Judgment herein, which Judgment was entered on June 24, 1975. The motion is based on an affidavit in support thereof signed by the Respondent, Vail M. Taylor, and filed in Court on June 25, 1975. It is also supported by the arguments in a document entitled "Issues the Court Should Consider" filed by the Respondent on July 25, 1975. That document is in response to a document filed by the Petitioner on July 23, 1975 entitled "Response to Respondent's Motion for a New Trial or Modification of Judgment."

The main thrust of the arguments of the Respondent in behalf of his motion is that the award by the Court in the Judgment of June 24th is unfair in regard to the distribution of the marital property of the parties, the amount of child support, and the award of maintenance over a period of two years in the sum of $500.00 per month, and for an additional period of two years in the sum of $250.00 per month. The Respondent argues that Petitioner should be now employed and that she can work and earn "at least $290.00 monthly, without the slightest difficulty." This may be true but the fallacy in the reasoning of the Respondent, as the Court attempted to make clear in the Findings of Fact of June 24th, is that the Petitioner, Barbara Taylor, with some proper training, can be capable of earning a much larger income. She has been a housewife during the past eighteen years, devoting herself to the duties of a homemaker (see KRS 403.190), and has not during that period of time acquired any job skills. In a four year length of time during which she would be taking training or schooling in fields in which she now has some experience, she can put

herself on the basis of earning a very much larger income than she can at the present time.

The fallacy in the reasoning of the Respondent is that he completely ignores this thinking, and suggests that Petitioner should go out now and get a low income job which would bring in some income but would not help her acquire job skills toward obtaining a much higher income. That is completely unrealistic. In the opinion of the Court, the four year period set for periodic maintenance is a minimum period during which the Petitioner can have schooling and training which will equip her to earn a much larger salary than she can now.

The Court has reviewed its findings in regard to the disposition of marital property (KRS 403.190) and child support (KRS 403.210) and finds them to be proper and equitable.

On another subject, the Respondent, in numerical paragraph 4 commencing on the lower part of page 6 of his affidavit filed June 25th, in regard to the securities owned by the parties, states that some of the securities are in the joint names of the parties, and these should be awarded to the Respondent as well as the securities in his name only. As the testimony taken at the trial has not been transcribed, it is not possible to determine the exact testimony in regard to this matter, but it was the recollection of the Court that the securities in question were all in the name of the Respondent, Vail M. Taylor. However, if any of the securities were in the joint names of the parties, they should certainly be included in the award to the Respondent, Vail M. Taylor, and the Findings by the Court on page 3 should be amended in this respect, and will be so amended in the Judgment which concludes this Memorandum Opinion.

Another point raised by the Respondent in numerical paragraph 5 of his affidavit, commencing at the bottom of page 6 thereof, is in regard to marital debts. He commences that paragraph by saying that "the husband and the wife had an arrangement whereby the husband was pay-

ing for necessary household expenses and he was giving the wife $100.00 weekly." He states that the Findings of the Court are ambiguous in regard to remaining marital debts. It was the recollection of the Court that all marital debts existing at the time of the separation of the parties on January 11, 1975 had been paid by the Respondent, and that the Agreement referred to in the quotation above as to debts and payment by Respondent to Petitioner after the separation has been fully complied with. If there are still outstanding debts incurred before the separation, or after the separation in accordance with the Agreement as stated in the quotation above, they should be paid by the Respondent, Vail M. Taylor. This of course excludes the mortgage on the house property, which in the Judgment of June 24, 1975 was specifically made the obligation of the Petitioner, Barbara N. Taylor.

JUDGMENT

1. The findings in the Memorandum Opinion set out above are incorporated herein and made a part of this Judgment by reference.

2. Any marital securities and savings bonds which were in the joint names of the parties shall be the property of the Respondent, Vail M. Taylor.

3. This is a final appealable Judgment and there is no just cause for delay; the amount in controversy herein exceeds the sum of $2500.00 exclusive of interest and costs.

(s) Alexander G. Booth
Judge
July 29, 1975

cc: Wyatt, Grafton & Sloss
Attorney for Petitioner
Mr. G. Phillip Deeb, Sr.
Attorney for Respondent